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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

The Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (EPAA), as originally enacted and as amended by the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (EPCA), established a system of price controls which governed the sale of crude oil and other petroleum products. The statutory scheme authorized the President to take action to lift controls or raise prices but permitted either House of Congress to veto such presidential action by a simple majority vote. The House of Representatives twice vetoed presidential decontrol orders. The court of appeals below held that the constitutional ruling in *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983), should not be applied retroactively to statutes enacted, regulations promulgated or legislative vetoes exercised prior to the *Chadha* decision. In the alternative, the court held that the veto provisions are severable and that the regulations promulgated under the acts are enforceable despite the impact on them of the threatened and actual use of the congressional veto power. The questions presented are:

1. Whether the constitutional ruling in *Chadha* has retroactive effect and therefore can be applied to the EPAA and the EPCA.

2. Whether the legislative veto provisions of the EPAA and the EPCA can properly be held severable merely on the ground that "Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all."

3. Whether price control regulations whose substance and duration were materially influenced by the presence and use of the legislative veto may constitutionally be enforced.

4. Whether effect should be given to the presidential decontrol orders vetoed by Congress.

PARTIES TO THE PROCEEDINGS

The following is a list of the parties to the proceedings below in the Temporary Emergency Court of Appeals of the United States, as required by Supreme Court Rule 21.1(b). A list of the parent companies, subsidiaries and affiliates (except wholly owned) of the corporate petitioners, as required by Supreme Court Rule 28.1, is set forth in Appendix J.

Plaintiffs (Petitioners here):

Energy Reserves Group, Inc.
Suburban Propane Gas Corporation
Marathon Petroleum Co. (formerly Marathon Oil Co.)
Sklar & Phillips Oil Company
Sierra Petroleum Co., Inc.
Braden-Zenith, Inc.
Mobil Oil Corporation
Mobil Producing Texas & New Mexico, Inc.
Mobil Oil Exploration & Producing Southeast, Inc.
Willie Ansley Bryson
Stelbar Oil Corporation, Inc.
The Standard Oil Company, an Ohio Corporation
Theo M. Glenn, Jr.
Eleanor E. Glenn
Robert Dale Brandenburg
Texaco Inc., a Delaware Corporation
Aminoil Inc. (formerly Aminoil USA, Inc.)
Conoco Inc. (formerly Continental Oil Co., Inc.)
Sun Exploration and Production Co.
Otis C. Peavey
Everal A. Peavey
Gladys G. Peavey
Ronald J. Peavey
Kenneth Wellbrock
Nora C. Binder
Fred J. Jorgensen
Arlene M. Wolfe

Dora J. Johnson
Robert F. Johnson
Marilyn J. Johnson
Howard Stout, Co-Trustee of the Charles S. Page Trust
Lorena Houlton, Co-Trustee of the Charles S. Page Trust
Mary E. Hall, Co-Trustee of the Charles S. Page Trust
Gulf Oil Corporation
Robert E. Davis
Energy Consumers and Producers Association, Inc. (formerly Oklahoma Association of Energy Consumers and Producers)
Ruthven, Inc.
Saline Supply Company, Inc. (formerly Pioneer Operations Company, Inc.)
George R. Jones
Rex Archer
T. B. Wilcox, III
Wico Oil Company
Jack Fena
James Tasheff
Robert G. Braden
National Cooperative Refinery Association
Estate of Martin Wunderlich
Estate of Charles F. Curry
Guy E. Stanley, Jr.
J. R. Dougherty
John B. Dougherty
Estate of Milton McGreevy
Herndon Drilling Company
Rhude & Fryberger, Inc.
Petroleum Management, Inc.
Atlantic Richfield Company
W. R. Murfin d/b/a Murfin Drilling Company
Champlin Petroleum Company
Exxon Corporation
Hunt Oil Company
Crystal Oil Company
Ira Thomas May

Muskegon Development Company
Paul B. Fletcher, Sr.
Anadarko Production Company
IU International Oil & Gas, Inc.
Wood Oil Co.
Dan Wallace d/b/a Columbus Oil Co.
Will I. Lewis Enterprises, Inc.
Jimmie Austin d/b/a Austin Drilling Company
Santa Fe Energy Company
George G. Anderman
Donald R. Kirby
Patricia Anne Leonard
Mary Kay Harrington
A. F. McMillan
Zula McMillan
Farmers Crude Production Co. (formerly Farmers Petroleum Cooperative, Inc.)
William C. Kirkwood d/b/a Kirkwood Oil and Gas Company
Petroleum Corporation of Texas

Defendants (Respondents here):

United States Department of Energy
Donald P. Hodel, Secretary of Energy

Intervenors:

Total Petroleum, Inc.
Tenneco Oil Company
Pennzoil Company
Tosco Corporation
Ashland Oil, Inc.
Texas City Refining, Inc.
American Independent Refiners Association (formerly American Petroleum Refiners Association)
Chevron U.S.A., Inc.
Farmland Industries, Inc.
Shell Oil Company
The State of Michigan

The State of Alabama
The State of California
The State of Arkansas
The State of Kansas
The State of Delaware
The State of Iowa
The State of North Dakota
The State of Rhode Island
The State of Texas
The Commonwealth of Virginia
The State of West Virginia
The State of Mississippi
The State of Montana
The State of Minnesota
The State of Colorado
The Commonwealth of Pennsylvania
The State of Georgia
The State of South Carolina
The State of Vermont
The State of Nebraska
The State of North Carolina
The State of Illinois
The State of Ohio
The State of South Dakota
The State of Wisconsin
The State of Oregon
The State of Maryland
The State of New Jersey
The State of Tennessee
The State of Nevada
The State of Hawaii
The State of New Mexico
The Commonwealth of Puerto Rico
The Territory of Guam
The U.S. Virgin Islands
The District of Columbia
The State of New York
The Commonwealth of Massachusetts

The State of Connecticut
The State of New Hampshire
The State of Maine
The State of Louisiana
The State of Utah
The State of Idaho
The State of Indiana
The State of Wyoming
National Freight, Inc.
Philadelphia Electric Co.
Payne 22, Inc.
Anthony Monaco
Rex Shipley
Robert Sharo
George Theodore
Harvey Hatfield
Richard Vielhaber
Nicholas Peto
National Oil Jobbers Council
Geraldine H. Sweeney
RJB Cab, Inc.
Air Transport Association of America
Virginia Electric and Power Company
The Jobbers' Group

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ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Energy Reserves Group, Inc., *et al.*, hereby petition for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States in these cases.[1]

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals of the United States (TECA) is as yet unreported and appears in Appendix (App.) A.[2] The opinion and order of the United States District Court for the

---

[1] The opinion below disposed of two consolidated cases, *Exxon Corp. v. United States Department of Energy*, No. 5-103, and *In re Department of Energy Stripper Well Exemption Litigation*, No. 10-51.

[2] Appendix A is attached to this petition. Appendices B through J are separately bound.

Northern District of Texas in *Dorchester Gas Producing Co. v. United States Department of Energy*, certifying the constitutional question to TECA,[3] is reported at 4 Energy Mgmt. (CCH) ¶ 26,464 (N.D. Tex. Dec. 21, 1983), and appears at App. B. (The opinion but not the order is also reported at 582 F. Supp. 927.) The opinion of the United States District Court for the District of Kansas in *In re Department of Energy Stripper Well Exemption Litigation*, MDL No. 378 (D. Kan. Jan. 25, 1984), also certifying constitutional questions, is reported at 578 F. Supp. 586, and appears at App. C.[4]

JURISDICTION

TECA's judgment was entered on July 6, 1984. This Court's jurisdiction is invoked under section 211(g) of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796, as amended by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748-50 (previously codified at 12 U.S.C. § 1904 note (1976)), App. G, pp. 136a-40a, as incorporated by

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[3] The district courts have no power to decide "substantial constitutional issues" in actions commenced under the EPAA and EPCA. Pursuant to § 211(c) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1976), incorporated by § 5(a)(1) of the EPAA, Pub. L. No. 93-159, 87 Stat. 627, 633, such issues must be certified to TECA.

[4] Only the constitutional issues arising from *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764 (1983), were before the court below and are sought to be reviewed here. Several previous opinions in these cases dealt with nonconstitutional issues. *See Energy Reserves Group, Inc. v. Federal Energy Admin.*, 447 F. Supp. 1135 (D. Kan.), *rev'd sub nom. Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (TECA 1978), *mandamus denied*, 613 F.2d 305 (TECA 1979), *on remand, In re Dep't of Energy Stripper Well Exemption Litig.*, 520 F. Supp. 1232 (D. Kan. 1981), *rev'd*, 690 F.2d 1375 (TECA 1982), *cert. denied*, 459 U.S. 1127 (1983); *Dorchester Gas Producing Co. v. United States Dep't of Energy*, 582 F. Supp. 911 (N.D. Tex. 1983).

section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633, App. G, p. 152a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 1 and Section 7, clauses 2 and 3, and the Fifth Amendment are reprinted at App. F. The Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, and extensions thereof are reprinted at App. G, pp. 141a-59a. The Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, Title IV and Title V, Part C, are reprinted at App. G, pp. 160a-200a.

STATEMENT

This is the first case to present this Court with a full range of issues regarding the scope and application of *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983). Both of the statutes under which this case arises, the Emergency Petroleum Allocation Act (EPAA) and the Energy Policy and Conservation Act (EPCA), contain legislative veto provisions. TECA's ruling against retroactive application of *Chadha* threatens to emasculate that decision and thus by itself merits review by this Court. The decision below also applies an erroneous test for determining the severability of unconstitutional statutory provisions and raises fundamental questions regarding the application of the principle of *Chadha* in circumstances where the impending threat and actual use of the legislative veto shaped a regulatory scheme. Finally, TECA refused to enforce regulations that were vetoed by Congress, thereby sustaining the actual exercise of an unconstitutional legislative veto.

A. Background Of These Consolidated Cases.

The decision below was entered in two consolidated cases, one originating in the District of Kansas (the

"stripper well" case) and one originating in the Northern District of Texas (the "NGL" case). These two cases began as separate challenges by producers and refiners to different portions of the price control regulations promulgated under the EPAA and the EPCA. In the court below, however, the two cases presented common constitutional questions following in the wake of *Chadha* and therefore were heard on a consolidated basis.

1. *The stripper well case.* Price control regulations under the EPAA, as originally enacted and as amended by the EPCA, were in effect from December 27, 1973, to January 28, 1981. During most of this time, crude oil produced from so-called stripper well properties (defined as properties with average daily production of not more than 10 barrels per well per day) was exempt by statute from price controls.[5] The plaintiffs in the stripper well case initially sought declarations that injection wells[6] were to be taken into account in determining stripper well status.

The district court entered preliminary injunctions which allowed the plaintiffs to sell the crude oil in question at market prices but required them to place into escrow the difference between the price received and the maximum lawful price that could have been charged if the crude oil were subject to controls. (An exemplar injunction appears at App. D.) The escrow accounts so established now contain in excess of $800 million. In

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[5] EPAA § 4(e)(2)(A). EPCA § 401(a) (adding EPAA § 9(b)(1)) repealed the stripper well exemption, and all stripper production was briefly subjected to price controls. *See* 41 Fed. Reg. 4931 (1976). However, Congress reinstated the stripper well exemption in the Energy Conservation and Production Act, § 121, Pub. L. No. 94-385, 90 Stat. 1125, 1132-33 (1976).

[6] "Injection wells" are wells through which water or other matter is injected into a crude oil reservoir to maintain the pressure required to drive oil to the well bore through which oil is extracted from the reservoir.

In re Department of Energy Stripper Well Exemption Litigation, 690 F.2d 1375 (TECA 1982), *cert. denied*, 459 U.S. 1127 (1983), TECA upheld the position of the Department of Energy (DOE) that injection wells are to be disregarded in determining stripper well status. The district court is now considering the proper disposition of the escrow accounts and other enforcement issues. *See* App. C, pp. 83a-85a.

Following this Court's decision in *Chadha*, the plaintiffs moved to certify to TECA certain constitutional questions arising from the one-house veto provisions contained in the EPAA and the EPCA, and that motion was granted by order of January 25, 1984. App. C, pp. 85a-93a.

2. *The NGL case.* The plaintiffs in the NGL case challenged the interpretation and validity of regulations issued under the EPAA and the EPCA governing natural gas liquids (NGLs).[7] In an opinion dated November 23, 1983, the district court granted the plaintiffs' motion for summary judgment on one issue and granted DOE's motion for summary judgment on three other issues. App. B, pp. 41a-56a. At the same time, the court certified the case to TECA for consideration of the constitutional issue raised by *Chadha*. *Id.*, pp. 56a-59a.

B. The Challenged Statutory Provisions.

The EPAA, as originally enacted and as amended by Title IV of the EPCA, constitutes an integral statutory scheme requiring the President to promulgate price controls but authorizing the President to act to lift controls or raise prices subject to the right of either House of Congress to veto such presidential action by a simple majority resolution. Through threatened and actual exercise of this legislative veto, Congress hamstrung the President's delegated authority to decontrol crude oil and

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[7] NGLs are liquids composed of ethane, propane, butane, and natural gasoline that may be recovered by processing natural gas.

refined petroleum products and to establish prices at levels he believed to be warranted.

1. *The EPAA.* The EPAA was enacted in November, 1973, during a period of crude oil and petroleum product shortages. Pub. L. No. 93-159, 87 Stat. 627. App. G, pp. 141a-55a. Section 4(a) of the EPAA required the President to promulgate regulations "for the mandatory allocation of crude oil . . . at prices specified in (or determined in a manner prescribed by) such regulation." The statute was enacted as temporary emergency authority, to expire not later than February 28, 1975. EPAA § 4(g)(1). The EPAA was then extended three times for six months or less. *See* Pub. L. No. 93-511, 88 Stat. 1608 (1974); Pub. L. No. 94-99, 89 Stat. 481 (1975); Pub. L. No. 94-133, 89 Stat. 694 (1975). App. G, pp. 156a-59a.

While mandating temporary imposition of price controls, the EPAA required the President to preserve "an economically sound and competitive petroleum industry," to provide for "economic efficiency," and to minimize "economic distortion, inflexibility, and unnecessary interference with market mechanisms." EPAA § 4(b)(1)(D), (H), (I). To permit these ends to be achieved, section 4(g)(2) authorized the President "at any time" to exempt crude oil or refined petroleum products from the price controls for up to 90 days at a time.

Presidential decontrol orders were, however, subject to a provision for one-house legislative veto. The President was required to submit any decontrol order to Congress at least five legislative days prior to its proposed effective date; either House could veto such an order by majority vote. EPAA § 4(g)(2). The EPAA did not include a severability provision.

Beginning in 1975, President Ford developed plans to exercise this decontrol authority. He submitted two major decontrol orders to Congress in July 1975. Both were

vetoed by majority vote in the House. 121 Cong. Rec. 23,983-84 (1975); *id.* at 25,881-82. (These vetoes are discussed at p. 26 *infra.*)

2. *The EPCA.* The EPCA was enacted in December 1975. Pub. L. No. 94-163, 89 Stat. 871. App. G, pp. 160a-200a. Section 401 of the Act amended the EPAA by adding a new section 8 entitled "Oil Pricing Policy." Section 8(a) required the President to amend the existing price regulations so as to establish an "actual weighted average first sale price" for all crude oil produced in the United States of not more than $7.66 per barrel. EPCA § 401(a) (adding EPAA § 8(a)).

The President was also given authority to implement decontrol through price increases. However, section 401 subjected four aspects of the President's pricing authority to three distinct one-house veto provisions. The President was required to submit regulations for legislative review (1) if he sought to create production incentives by authorizing increases in the composite price in excess of three percent per year, EPCA § 401(a) (adding EPAA § 8(e)(1)(A)); (2) if he sought to allow combined production incentives and inflation adjustments in excess of ten percent per year, *id.* (adding EPAA § 8(e)(1)(B)); (3) if he sought to allow any price increases for production incentives past a certain date in 1977, *id.* (adding EPAA § 8(f)); or (4) if he sought to allow higher prices to create production incentives outside of Alaska, *id.* (adding EPAA § 8(g)).[8] The EPAA § 4(g) authority to decontrol crude oil and petroleum products altogether was replaced by EPCA § 455 (adding EPAA § 12), which authorized the President to decontrol refined

[8] The EPCA provisions relating to the 3% limitation on production incentives were repealed by § 122 of the Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976). However, a presidential order seeking to exceed the combined 10% limitation on production incentives and inflation adjustments continued to be subject to legislative veto.

products, residual fuel oil, or crude oil after the first sale. As under former EPAA § 4(g), such decontrol orders were subject to one-house veto. Like the EPAA, the EPCA had no severability clause.

C. The Decision Below.

The court of appeals held that the constitutional ruling in *Chadha* may not be applied retroactively to the EPAA and the EPCA. App. A, pp. 30a-35a. The court further concluded that the legislative veto provisions of the EPAA and the EPCA are severable from the remainder of those statutes, App. A, p. 36a, explictly adopting the standard employed in *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (TECA), *petition for cert. filed*, 53 U.S.L.W. 3021 (U.S. July 5, 1984) (No. 84-20),[9] which had stated the test for severability to be "whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all." App. E, p. 109a. The court refused to invalidate regulations whose substance and duration had been influenced by actual and threatened exercise of legislative vetoes. App. A, pp. 37a-39a. The court also refused to enforce the decontrol orders that had been vetoed by the House. *Id.*, p. 39a.

REASONS FOR GRANTING THE WRIT

This Court's invalidation of the legislative veto in *Chadha* was a constitutional decision of wide public importance. In the wake of that decision, a number of important questions remain to be resolved. The present case demonstrates the necessity for the Court to act to prevent erosion of the *Chadha* ruling and to give authoritative guidance to the lower courts on these remaining questions.

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[9] The petition for certiorari in *Dyke* does not involve the question of severability or any other issue related to *Chadha*.

In this case, the legislative history shows that the one-house veto provisions in both the EPAA and the EPCA were integral to the statutory scheme. It is evident, moreover, that the presence of the unconstitutional veto power was a palpable force in shaping the price control regulations under those statutes. The veto was exercised to strike down two presidential decontrol orders, and the threat of further exercise was never far beneath the surface. The court below nonetheless declined to apply *Chadha* retroactively and, indeed, declined to give that decision any effect whatever.

The case thus poses several important post-*Chadha* issues that should be resolved by this Court: (1) retroactive vs. prospective only application; (2) the severability of one-house veto provisions that were of undoubted importance in the legislative compromises necessary to secure enactment; (3) the enforceability of regulations whose substance and duration were shaped by the existence and use of the unconstitutional veto power; and (4) the effect to be given presidential orders that were unconstitutionally vetoed. Because of the growing number of cases that present such issues,[10] there is a special need for this Court to exercise its power of supervision in order to promote consistency in the development of applicable legal standards.

Moreover, the decision below rejecting retroactive application of *Chadha* is in direct conflict with two summary affirmances by this Court in *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983), and *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir.

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[10] *See, e.g., Alaska Airlines, Inc. v. Donovan*, No. 84-0485 (D.D.C. May 18, 1984), *appeals docketed*, Nos. 84-5467 & 84-5468 (D.C. Cir. July 26, 1984) (§ 43 of the Airline Deregulation Act); *EEOC v. Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, 52 U.S.L.W. 3889 (U.S. June 11, 1984) (No. 83-1021) (Reorganization Act of 1977); *Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983) (Presidential Recordings and Materials Act).

1982), *aff'd*, 103 S. Ct. 3556 (1983). And the legal standard used by TECA in resolving the issue of severability is incompatible with that consistently employed by this Court. *See Chadha*, 103 S. Ct. at 2774; *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Review therefore also is warranted to ensure adherence by the lower courts to this Court's decisions. Finally, this is a case of great importance to the petroleum industry.

I. THE *CHADHA* RULING IS NOT LIMITED TO PROSPECTIVE EFFECT.

These actions challenge statutes and regulations that predate this Court's decision in *Chadha*, and the actions were commenced prior to *Chadha*. The question is thus presented whether the ruling in *Chadha* should be applied retroactively to those statutes and regulations. The court below, saying that this was "the primary issue to be decided," held that *Chadha* was not to be given any retroactive effect. App. A, p. 30a. The court therefore upheld actual exercises of the legislative veto and did not reinstate the vetoed presidential decontrol orders. Moreover, in the court's view, even if the one-house veto provisions of the EPAA and the EPCA were inseverable from the remainder of those statutes and even if Congress did demonstrably influence the regulations through the veto power, the statutes and the regulations promulgated thereunder could nonetheless continue to be enforced. These determinations conflict with decisions both of this Court and of other lower courts and are incorrect.

A. This Court Has Indicated That *Chadha* Is To Be Applied Retroactively.

In *Chadha*, this Court gave every indication that its ruling would have retroactive effect. The far-reaching consequences of the decision were well known to the Court, which noted that congressional veto provisions appear in a large number of statutes. 103 S. Ct. at 2781. A dissenting opinion called attention to nearly 200 statutes which contain legislative veto provisions, including

the EPCA. *Id.* at 2792, 2794-95, 2812 (White, J., dissenting). Concurring and dissenting opinions both observed that the apparent effect of the ruling was to invalidate all of these provisions. *Id.* at 2788 (Powell, J., concurring); *id.* at 2792, 2796, 2810-11 (White, J., dissenting). The opinion of the Court, while responding to the concurring and dissenting opinions in other respects, *id.* at 2781, 2787-88 nn. 21, 22, did not dispute this conclusion.

In these circumstances, it seems quite probable that the Court would have signaled a "prospective only" application if that was its purpose. Yet it gave no hint of such an intention. *Compare Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982), and *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976) (decisions explicitly stated to have only prospective effect).

Any doubt about this Court's intention should have been put to rest by its action, shortly after deciding *Chadha*, in summarily affirming two decisions striking down legislative veto provisions in two other statutes. *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983) (Federal Trade Commission Improvements Act of 1980); *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983) (Natural Gas Policy Act of 1978). Both cases involved statutes enacted prior to *Chadha* and agency action that predated *Chadha*. Those summary affirmances are authoritative pronouncements that bind the lower courts on the question of retroactivity. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Meek v. Pittenger*, 421 U.S. 349, 367 n.16 (1975).

Taking their cue from this Court, several lower courts have applied *Chadha* retroactively to invalidate legislative veto provisions or actions under statutes containing such provisions. *See Alaska Airlines, Inc. v. Donovan*, No. 84-0485 (D.D.C. May 18, 1984), *appeals docketed*,

Nos. 84-5467 & 84-5468 (D.C. Cir. July 26, 1984); *EEOC v. Martin Industries, Inc.*, 581 F. Supp. 1029 (N.D. Ala.), *appeal docketed*, No. 83-1893 (U.S. May 18, 1984); *EEOC v. Westinghouse Electric Corp.*, 33 F.E.P. Cas. (BNA) 1232 (W.D. Pa. Jan. 5, 1984), *appeal docketed*, No. 83-1938 (U.S. May 25, 1984); *Allen v. Carmen*, 578 F. Supp. 951, 966-68 (D.D.C. 1983); *City of Alexandria v. United States*, 3 Cl. Ct. 667, 675-78 (Oct. 20, 1983), *rev'd on other grounds*, No. 84-713 (Fed. Cir. June 21, 1984); *EEOC v. Allstate Insurance Co.*, 570 F. Supp. 1224, 1232-33 (S.D. Miss 1983), *appeal dismissed*, 52 U.S.L.W. 3889 (U.S. June 11, 1984) (No. 83-1021) The only case declining to give *Chadha* retroactive effect, other than the decision below, is *EEOC v. Chrysler Corp.*, 33 F.E.P. Cas. (BNA) 1838, 1843-44 (E.D. Mich. Jan. 24, 1984).

Thus, TECA's holding in this case conflicts with the apparent intent of this Court in *Chadha*, with this Court's summary affirmances in *Consumers Union* and *Consumer Energy Council*, and with the predominant weight of lower court authority. The issue warrants review by this Court to ensure consistent application of the important constitutional ruling in *Chadha*. *Cf. EEOC v. Allstate Insurance Co.*, 52 U.S.L.W. at 3890 (Burger, C.J., dissenting from dismissal for want of jurisdiction).

B. Governing Principles Of Retroactivity Require Application Of *Chadha* Here.

Only in exceptional circumstances has this Court refused to give retroactive application to rulings in civil cases. When the Court has limited such rulings to prospective application, it has applied a three-part test that was summarized as follows in *Northern Pipeline*, 458 U.S. at 87-88:

> "Our decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first,

> whether the holding in question 'decid[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases . . .; second, 'whether retrospective operation will further or retard [the] operation' of the holding in question . . .; and third, whether retroactive application 'could produce substantial inequitable results' in individual cases . . . ."

By its summary affirmances in *Consumers Union* and *Consumer Energy Council*, this Court evidently determined that these considerations do not bar retroactive application of the ruling in *Chadha*.

In any event, the three-part test articulated in *Northern Pipeline* does not justify declining to give *Chadha* retroactive application. First, the validity of the one-house veto was open to serious doubt long before the decision in *Chadha*. *See Allen v. Carmen*, 578 F. Supp. at 966 (*Chadha* "not the type of decision that constituted an entire break with the past or one that was not foreshadowed"); *EEOC v. Allstate Insurance Co.*, 570 F. Supp. at 1233 ("definitely foreshadowed by prior events"). For decades, presidents had questioned the constitutionality of congressional vetoes. *See* 103 S. Ct. at 2779 n.13; *Consumer Energy Council*, 673 F.2d at 453-54. Furthermore, the legislative veto had been invalidated by courts of appeals in several prior actions.[11] Even the existence of conflicting decisions in the courts of appeals on an issue makes "review of that issue by this Court and decision against the position of the respondent reasonably foreseeable." *United States v. Rodgers*, 104 S. Ct. 1942, 1949 (1984). *See Dasho v. Susquehanna Corp.*, 461 F.2d 11, 20-21 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972) (decision resolving a conflict in the circuits does not estab-

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[11] *See American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982); *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982); *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980). Only in *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), was a legislative veto sustained.

lish "a new principle of law" within the meaning of *Chevron*).[12]

As to the second factor, there is no respect in which retroactive application of the rule in *Chadha* could be said to retard its operation. Indeed, to permit continued enforcement of a statute unconstitutional under *Chadha*, and to give effect to the actual exercise of a legislative veto, would undermine the purpose of that decision. As this Court emphasized, "the carefully defined limits on the power of each Branch must not be eroded. . . . [W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." 103 S. Ct. at 2787, 2788. These restraints should not operate merely prospectively. *See EEOC v. Allstate Insurance Co.*, 570 F. Supp. at 1229 ("It is evident from the opinion in *Chadha* that 'every use of the legislative veto' is invalid," quoting Powell, J., concurring, 103 S. Ct. at 2788.).

In declining to apply *Chadha* retroactively, the court below relied primarily on its conclusion that retroactive application of *Chadha* "would produce substantive inequitable results." App. A, p. 35a. But the true inequity would be to permit continued enforcement of unconstitutional statutes and invalid legislative actions. These cases illustrate the problem in an acute form and dramatize the unfairness inherent in a failure to apply the ruling in *Chadha* to statutes enacted and vetoes exercised prior to the date of decision. In these and other cases, the government is attempting to impose liability of hundreds of millions of dollars on the basis of price control regulations that were promulgated under statutes that contravened the principle of *Chadha*—regulations, moreover, whose

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[12] In *Chevron*, the Court stressed that the decision which it determined to apply only prospectively had overruled a long line of contrary decisions. 404 U.S. at 107. *See United States v. Johnson*, 457 U.S. 537, 550-51 (1982).

substance and duration were shaped by congressional pressure exerted through threatened and actual exercise of the legislative veto. DOE succeeded for years in enforcing these regulations, to the vast detriment of the petroleum industry. Billions of dollars transferred from producers between 1973 and 1981 are now irretrievably lost. *See* J. Kalt, *The Economics and Politics of Oil Price Regulation* 187-235 (1981). It would be manifestly unjust to require the further transfer of additional hundreds of millions of dollars pursuant to unconstitutional statutes and invalid regulations.

The countervailing inequity perceived by TECA in this case is entirely illusory. Contrary to the court's suggestion, invalidation of the EPAA and the EPCA under *Chadha* would not disturb "a nearly infinite number of obligations incurred or performed in good faith, and enforced or enforceable in administrative and judicial proceedings." App. A, p. 35a. Such a determination would affect only pending proceedings and future actions that are timely brought. It would not revive or undo transactions which are subject to a bar of res judicata or statute of limitations. *E.g., Hill v. Stone*, 421 U.S. 289, 301-02 (1975); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (per curiam). *See Zweibon v. Mitchell*, 606 F.2d 1172, 1177 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981).[18]

In short, this Court already has applied the ruling in *Chadha* retroactively, and consideration of the three-part

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[18] As stated by Justice Harlan:

"The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. . . . [T]hat moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become res judicata." *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (concurring opinion).

test indicates that continued such application is proper. Indeed, if *Chadha* were not to be applied retroactively to statutes enacted or legislative vetoes exercised prior to the date of decision, it would lose much of its essential force and effect. TECA therefore clearly erred in refusing to apply that ruling to the statutes and actual legislative vetoes at issue here.

II. THE LEGISLATIVE VETO PROVISIONS ARE INSEVERABLE FROM THE REMAINING SECTIONS OF THE EPAA AND THE EPCA.

A. TECA Applied The Wrong Test For Severability.

A statute that incorporates unconstitutional provisions must fall in its entirety unless the invalid provisions are severable. *See, e.g., Sloan v. Lemon*, 413 U.S. 825, 834 (1973). The proper standard for determining severability has been firmly established by this Court: the entire statute falls if " 'it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " *Chadha*, 103 S. Ct. at 2774 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), and *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)).

With respect to the issue of severability, the opinion below rests upon *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (TECA), *petition for cert. filed*, 53 U.S.L.W. 3021 (U.S. July 5, 1984) (No. 84-20). Though the *Dyke* opinion made passing reference to the proper standard, *id.* at 803, it departed from precedent by actually applying a completely different and erroneous test for severability: "[T]he question is . . . whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all." *Id.* at 804.

The *Dyke* formulation seriously diverges from the proper test because it excludes consideration of one of the most likely possibilities, *i.e.*, that, had Congress known the legislative veto was invalid, it would have enacted a

different statute rather than no statute at all. The test reaffirmed in *Chadha* is not met merely because Congress would have enacted some form of alternative legislation in any event. "[T]he issue is whether Congress would have enacted the *same* statute." *Alaska Airlines, Inc. v. Donovan*, No. 84-0485, slip op. at 5 n.3 (D.D.C. May 18, 1984), *appeals docketed*, Nos. 84-5467 & 84-5468 (D.C. Cir. July 26, 1984) (court's emphasis). *See also Lemke v. Farmers Grain Co.*, 258 U.S. 50, 60 (1922); *Consumer Energy Council*, 673 F.2d at 442. The lower court's use of a severability test inconsistent with the test approved in *Chadha* warrants this Court's review.

B. Neither The EPAA Nor The EPCA Would Have Been Enacted In The Same Form Without The Legislative Veto Provisions.

Because it applied the wrong severability test, the court below reached the wrong result. The legislative history shows beyond doubt that Congress would not have enacted the same statutes independently of the one-house veto provisions. Under the proper test, therefore, those provisions are inseverable.

1. *The EPAA.* The legislative veto provision in the EPAA was an essential part of a carefully integrated scheme to resolve an impasse between a Congress desiring mandatory price and allocation controls and a President opposed to such controls.

In early 1973, over the opposition of congressional Republicans, Congress passed amendments to the Economic Stabilization Act of 1970 (ESA) authorizing, but not requiring, the President to allocate petroleum products. Pub. L. No. 93-28, 87 Stat. 27 (1973). On signing this bill into law, President Nixon emphasized his reservations concerning such controls, 1973 Pub. Papers of Pres. Nixon 340, and he declined to exercise the new authority. *See* 119 Cong. Rec. 16,710-11 (1973) (Sen. Jackson). Thereupon, additional legislation was proposed to require the President to impose allocation controls. S. Rep. No. 159, 93d Cong., 1st Sess. 6 (1973) (S. 1570); H.R. Rep.

No. 531, 93d Cong., 1st Sess. 10-12, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2582, 2587-89 (H.R. 9681). By October 1973, both Houses had passed such bills; the House bill also mandated price controls. Neither bill provided for presidential decontrol. *See* 119 Cong. Rec. 18,064-67 (1973) (S. 1570); *id.* at 34,477-79 (H.R. 9681).

When the Senate and House bills went to conference, the polar positions of the President and the Congress had to be reconciled. The majority in Congress believed that the national energy crisis required the prompt enactment of a statute mandating the imposition of controls. *See* 31 Cong. Q. 2826, 2785 (Oct. 20, 1973); 2960-62 (Nov. 10, 1973); 3007-09 (Nov. 17, 1973). At the same time, Congress recognized that the President's opposition to mandatory controls was strong and that he apparently was prepared to veto the bills as passed. *See* 31 Cong. Q. 1465 (June 9, 1973); 2825 (Oct. 20, 1973); 3020, 3057 (Nov. 17, 1973); 3275 (Dec. 15, 1973).[14] From the beginning, the President had sought decontrol authority, and he considered the absence of any "provision . . . for removing controls" to be a serious defect. 119 Cong. Rec. 18,054 (1973) (letter from William Simon, Deputy Secretary of the Treasury); *see also id.* at 34,312 (letter from John A. Love, Assistant to the President).

A stalemate was avoided only by adding in conference (1) decontrol provisions to satisfy the President and (2) legislative veto provisions to reassure Congress. The Democratic House manager of the EPAA and Chairman of the Conference Committee, Representative Staggers, described the addition of the decontrol authority and legislative veto provisions as among "the most significant

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[14] A successful presidential veto was a distinct possibility. Shortly after enactment of the EPAA, Congress passed a bill that would have rolled back domestic crude oil prices. 120 Cong. Rec. 3467, 4439 (1974). President Nixon vetoed the bill, 1974 Pub. Papers of Pres. Nixon 226, and the Senate sustained the veto. 120 Cong. Rec. 5534 (1974).

matters agreed to in conference," and he emphasized the congressional power to "override" presidential determinations. 119 Cong. Rec. 36,866 (1973).

The EPAA's decontrol provisions would not have been passed by Congress without the legislative veto provisions. Such a bill would have given the President unchecked discretion over the regulatory program and thus defeated the congressional purpose in mandating controls. At the same time, Congress concluded that it could not omit decontrol authority in view of the likelihood of a successful veto. In short, the integral scheme of price controls, decontrol authority, and legislative review was enacted as a whole to break a political stalemate. That scheme must stand or fall as a whole.[15]

2. *The EPCA.* The EPCA was a still more precisely calibrated political compromise, in which even greater attention was given to the role of the legislative veto. Between enactment of the EPAA in November 1973 and enactment of the EPCA in December 1975, the political struggle over energy policy intensified sharply.

President Ford wanted to free energy prices from controls in order to stimulate domestic production and encourage conservation. In February 1975, he proposed legislation pursuant to which price controls would have expired on June 30, 1975. H.R. Doc. No. 42, 94th Cong., 1st Sess. (1975). When this legislation was not acted upon, the FEA proposed, and then promulgated, regulations to phase out price controls on crude oil. The Democratic congressional majority, however, was steadfastly opposed. By threatened and actual use of legislative vetoes, the House blocked the President from decontrolling petroleum prices. *See* 121 Cong. Rec. 23,984 (1975);

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[15] The EPAA did not contain a severability clause, and this omission hardly seems to have been inadvertent. In enacting the EPAA, Congress had before it as a model the generally applicable Economic Stabilization Act of 1970. The EPAA incorporated a number of ESA provisions, but the ESA's severability clause (§ 220) was not included. EPAA § 5(a)(1).

id. at 25,881-82. In turn, President Ford vetoed proposed legislation seeking to enlarge or prolong price controls in ways that he thought unwarranted, and his vetoes were sustained. 121 Cong. Rec. 24,476 (1975) (Senate); *id.* at 28,489-90 (Senate).

Against the background of this battle of presidential and congressional vetoes, the Conference Committee invited the Administration to confer over the differing congressional proposals before it. Congress was determined to continue crude oil price controls. But the President would veto any bill containing inflexible price control provisions. *See* H.R. Conf. Rep. No. 340, 94th Cong., 1st Sess. 306 (1975) (minority views).[16]

Within these constraints, Congress and the President reached a hard-bargained compromise whose essential elements again included price controls, decontrol authority, and legislative veto provisions. The Senate Report stated that the legislative veto provisions were "necessary" in view of the President's announced intention to decontrol crude oil prices, "an action with such enormous economic implications [that it] must first be reviewed by the Congress." S. Rep. No. 26, 94th Cong., 1st Sess. 47-48 (1975). *See also* H.R. Conf. Rep. No. 340, 94th Cong., 1st Sess. 40, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1802. The Senate as a whole had specifically voted to retain veto powers in response to Senator Jackson's argument that the veto provisions were a "safeguard," the "abdicat[ion]" of which would "do more harm to the economy" than "anything" of which he could think. 121 Cong. Rec. 9857 (1975). Similarly, the House Report stated that legislative vetoes over decontrol authorities were necessary because "Congress must be assured that the President has made a rational selection of criteria." H.R. Conf. Rep. No. 340, 94th Cong., 1st Sess.

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[16] Neither the House bill nor the Senate bill had garnered the two-thirds majority necessary to override a potential presidential veto. *See* 121 Cong. Rec. 9868 (1975) (Senate vote seven votes short); *id.* at 29,852 (House vote 34 votes short).

40, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1802.[17]

In putting together this compromise legislative package, the Conference Committee specifically deleted a severability clause, *compare* S. 622, § 128, 94th Cong., 1st Sess., *reprinted in* 121 Cong. Rec. 9868, 9875 (1975) *with* S. Conf. Rep. No. 516, 94th Cong., 1st Sess. (1975), thus clearly demonstrating that the EPCA was intended to stand or fall as a whole. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). This is particularly significant, because Congress was well aware of the uncertain constitutional status of the legislative veto. *See* Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 Harv. J. Legis. 735, 737-38 n.7 (1979).[18]

* * * *

In short, it is "evident" that Congress "would not have enacted those provisions [of the EPAA and the EPCA] which are within its power, independently of that which is not." *Chadha*, 103 S. Ct. at 2774. Severance of the veto authority alone would delete the safety valve that

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[17] In the Conference Report recommending amendments to the EPCA, the same Congress in its next session characterized the legislative veto as an integral part of "the EPCA decisionmaking principle" that gave Congress "primary responsibility for assessing appropriateness of oil price increases." S. Conf. Rep. No. 1119, 94th Cong., 2d Sess. 56, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2027, 2033.

[18] Severability clauses were incorporated in related legislation enacted during the same time period. For example, between enactment of the EPAA and the EPCA, severability clauses were included in the Federal Energy Administration Act of 1974, § 27, Pub. L. No. 93-275, 88 Stat. 96, 115, and the Energy Reorganization Act of 1974, § 311, Pub. L. No. 93-438, 88 Stat. 1233, 1253. Subsequently, such a clause was included in the Department of Energy Organization Act, § 706, Pub. L. No. 95-91, 91 Stat. 565, 607 (1977), and the Energy Security Act, § 176, Pub. L. No. 96-294, 94 Stat. 611, 678 (1980).

Congress insisted on retaining.[19] Severance of the decontrol provisions as well would delete authority the President had demanded as a condition of signing the bill into law. In either case, severance is impermissible because the resulting statute would be "quite different" from the bill passed by Congress and signed by the President. *See Sloan v. Lemon*, 413 U.S. at 834.

III. THE SUBSTANCE AND DURATION OF THE PRICE CONTROL REGULATIONS WERE UNCONSTITUTIONALLY INFLUENCED BY THE VETO POWER RESERVED TO AND USED BY CONGRESS.

The price control regulations were pervasively influenced by the existence, threatened use, and actual use of the veto power. Successive Presidents, and especially President Ford, were prevented from modifying or terminating price controls in the manner they saw fit. This result was constitutionally improper whether or not the legislative veto provisions are severable from the remainder of the statutes.

Regulations which have not been vetoed may nonetheless be unconstitutional if their substance or duration has been influenced by the retention and use of legislative veto power. In *Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983), Congress had invoked the one-house veto provisions incorporated in the Presidential Recordings and Materials Act to reject successive sets of regulations promulgated by the General Service Administration. The court found the legislative veto provisions in the Act to be severable. *Id.* at 971. Nonetheless, relying

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[19] *See McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) ("[w]hen the questioned clause restricts a power granted by the legislature, the case against severance is strong" because "[o]therwise, the scope of the power would be enlarged beyond the legislature's intent").

on *Chadha*, the court struck down as "tainted" the regulations finally found acceptable by Congress, *id.* at 969, concluding that "[i]n the absence of the repeated exercise of the legislative veto, the regulations would not have undergone the changes they did." *Id.* at 968.

Here, the existence of congressional coercion is manifest. Virtually from the moment President Ford announced in the 1975 State of the Union message that he intended to decontrol crude oil, *see* I Pub. Papers of Pres. Ford 41 (Jan. 15, 1975), he was subjected to strong congressional opposition.[20] In March 1975, Representative Dingell (Chairman of the House subcommittee with oversight responsibility for implementation of the EPAA) and Representative Ullman (Chairman of the House Ways and Means Committee) met with FEA Administrator Zarb and told him that Congress would reject immediate decontrol. *See* Frank G. Zarb Memorandum to the President, p. 1 (March 8, 1975). App. I, pp. 284a-85a.[21] On April 30, 1975, Majority Leader Mansfield warned that "unilateral" decontrol by the President would be vetoed by the Senate. *See* Max Friedersdorf Memorandum to the President, with attachments (May 1, 1975). App. I, p. 308a. President Ford retreated to a 25-month decontrol plan, 40 Fed. Reg. 19,219 (1975), but withdrew it in the face of a likely congressional veto. *See* Bruff & Gellhorn, *supra* note 20, at 1392. He then successively issued 30- and

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[20] Earlier, in July 1974, the Federal Energy Administration (FEA) had proposed to exempt residual fuel oil from allocation controls, 39 Fed. Reg. 24,669 (1974), App. H, pp. 201a-07a, but was forced to withdraw its proposal after a group of Northeastern congressmen convinced the agency that the proposal would be vetoed. Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study In Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1391 (1977).

[21] The documents set forth in App. I were obtained from the public files of the Gerald R. Ford Library in Ann Arbor, Michigan, and were included in the record before the court of appeals.

39-month decontrol orders, both of which were vetoed by majority vote in the House. *See infra* p. 26.[22]

Where Congress is actively interested in a subject, as it was in energy policy, the very existence of congressional veto power is enough to distort the Executive's exercise of delegated powers. The "threat of a veto is much more plausible than the threat of a statutory amendment, making administrators more likely to succumb to congressional interference." *Consumer Energy Council*, 673 F.2d at 475 n.213. *See also Hearing Before Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 2-3 (1983) (statement of Sen. Grassley) ("It is not the actual exercise of the [legislative veto] tool that is so important, but the threat of such an exercise"). Where the veto has actually been exercised, the threat is especially persuasive.

Presidential action under the EPCA well illustrates the effect of such pressure. The Administration's "sequence

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[22] This sequence was contemporaneously described as follows:

> "In January the President advocated immediate decontrol as the most effective way to . . . decrease our dependence on OPEC oil supplies and price policy. However, the Congress objected to immediate decontrol. As we began our hearings in the Commerce Committee, it was clear that a majority of that subcommittee . . . would not accept immediate decontrol because it feared the negative economic impacts that would result . . . .
>
> The President responded to this concern by publishing . . . his second decontrol plan, which called for gradual decontrol over a 25-month period. Once again, the Congress expressed dissatisfaction . . . . Still hopeful of agreement, the President submitted for congressional consideration a third plan which not only placed a $13.50 cap on domestic oil prices but also lengthened the decontrol period to 30 months. This plan was the one that the House rejected last week on the grounds that the $13.50 cap was too high.
>
> Now, the President has presented to Congress a fourth plan [the 39-month amendment] which meets [this] criticism . . . ."

121 Cong. Rec. 25,874 (1975) (Rep. Brown); *see id.* at 25,880 (Rep. Leggett).

of decontrol" under the EPCA, for example, was determined in part by "the necessity to avoid having more than one decontrol proposal at a time before the Congress" in order to "minimiz[e] the constituencies opposed to any one action." Frank G. Zarb Memorandum to the President on Deregulation of Naphtha-Based Jet Fuel, pp. 1, 4 (undated attachment to Frank G. Zarb Memorandum to Elliot Richardson, *et al.*, Sept. 9, 1976). App. I, pp. 295a-98a. This cautious strategy resulted from continuing fear of congressional veto and tended to rule out more controversial steps, such as decontrolling crude oil, at an early stage. Other decontrol proposals were held hostage, under threat of veto, to secure the President's support for extraneous congressional measures.[23]

Thus, the threat of congressional veto shaped decontrol measures under the EPCA as it had under the EPAA. Congress thereby was enabled "to control the executive without going through the full lawmaking process." *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982) (per curiam). This "shared administration" of the EPAA and the EPCA contravened the principles of separation of powers. *See Consumer Energy Council*, 673 F.2d at 474.[24] Nor

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[23] *See* Frank G. Zarb Memorandum to the President on Petroleum Marketing Practices Act, p. 2 (June 9, 1976) ("Chairman Dingell has made it clear that some form of dealer protection legislation must be enacted before our gasoline decontrol proposal will be accepted by the Congress"). App. I, p. 289a. *Accord* Frank G. Zarb Memorandum to the President on Gasoline Decontrol, p. 2 (Dec. 30, 1976). *Id.*, p. 300a.

[24] In *Consumer Energy Council*, 673 F.2d at 475 n.213, the D.C. Circuit noted that the legislative veto is "significantly worse" than informal congressional interference with administrative decisionmaking. An example of such informal interference was considered in *Texas Medical Ass'n v. Mathews*, 408 F. Supp. 303 (W.D. Tex. 1976), where the court invalidated regulations promulgated by HEW because of undue congressional pressure on the agency, noting that "agency action is invalid if based, even in part,

does due process condone the use of a decisionmaking procedure that compels the Executive to tailor the exercise of delegated rulemaking authority to the political pressures of Congress.

IV. IF THE PRICE CONTROL REGULATIONS ARE TO BE ENFORCED AT ALL, EFFECT MUST BE GIVEN TO THE VETOED DECONTROL ORDERS.

On two occasions in July 1975, the House of Representatives vetoed decontrol orders that would have phased out the price controls on crude oil. The FEA had promulgated the first of these decontrol orders on July 14, 1975. It provided for phased decontrol at 3.3 percent per month over a 30-month period. 40 Fed. Reg. 30,030, 30,035-36 (1975). The House vetoed this 30-month decontrol order on July 22, 1975. 121 Cong. Rec. 23,983-84 (1975).[25] Following that veto, the FEA promulgated another decontrol order that would have phased out price controls over a 39-month period. 40 Fed. Reg. 31,741 (1975). The House vetoed that order as well, on July 30, 1975. 121 Cong. Rec. 25,881-82 (1975).[26]

Insofar as these exercises of legislative veto power are concerned, this case precisely parallels *Chadha*: the congressional vetoes of the Executive's decontrol orders violated the Constitution just as surely as did the congres-

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on pressures emanating from congressional sources." *Id.* at 306. When such pressures affect the agency's decisionmaking, "the resulting judgment is unlawful ab initio and not entitled to the sanctuary accorded untainted agency judgments." *Id.* at 306-07. *See also Sierra Club v. Costle*, 657 F.2d 298, 408-09 (D.C. Cir. 1981).

[25] Congress' unconstitutional exercise of legislative veto power in this case had a tremendous financial impact upon petitioners. In July 1975, the average ceiling price for crude oil subject to DOE's price regulations was $5.25. The average price of uncontrolled crude oil was $12.25. *See* 40 Fed. Reg. 30,030 (1975).

[26] In this context, the first vetoed decontrol order is the critical one, since the 39-month order would not have been promulgated had the 30-month order not been vetoed.

sional veto of the Attorney General's suspension of Mr. Chadha's deportation. Just as this Court gave effect to the vetoed suspension order in *Chadha*, TECA at a minimum should have given effect to the vetoed decontrol orders here.

The court below nevertheless refused to do so, on the unusual ground that the decontrol orders were invalid under the EPAA when promulgated in 1975. The court said that the vetoed orders could be ignored because (1) by their terms they were not limited to a period of 90 days, as purportedly required by EPAA § 4(g)(2), and (2) their duration extended beyond the expiration date of the EPAA. App. A, p. 39a. These belated objections to the President's action are without merit.[27]

It was well understood that the decontrol orders would be reviewed by Congress at 90-day intervals.[28] The transmittal letters for both the 30-month and the 39-month decontrol orders explicitly referred to the statutory 90-day provision and stated that the decontrol orders were "in accordance with § 4(g)(2) of the Act." *See* H.R. Doc. No. 216, 94th Cong., 1st Sess. 1 (1975); H.R. Doc. 223, 94th Cong., 1st Sess. 1 (1975). During the floor debate on the resolution to veto the 30-month decontrol

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[27] The government itself never questioned the validity of the decontrol orders until it became necessary to do so in this litigation to avoid the implications of *Chadha*. The orders were published in July 1975 in the Federal Register and properly promulgated pursuant to public notice and comment procedures. 40 Fed. Reg. at 30,030. The FEA transmitted the orders to Congress for its approval and defended them in congressional hearings. Congress did not question the President's authority to issue the orders under EPAA § 4(g)(2).

[28] The EPAA clearly authorized periodic renewal of a decontrol order. *See* H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess. 19, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2688, 2696 ("at the expiration of the 90 days that an amendment applies to an oil or product, a new amendment applicable to such oil or product could take effect").

order, it was recognized that there would be periodic congressional review of the order based on section 4(g)(2). *See* 121 Cong. Rec. 23,960 (1975) (Rep. Anderson); *id.* at 23,963 (Rep. Eckhardt); *id.* at 23,977 (Rep. Rhodes).[29]

Nor is there any support for the court's conclusion that the decontrol orders were invalid because they were not specifically limited in duration to the expiration date of the EPAA. At the time the 30-month decontrol order was promulgated, no one suggested that its duration rendered it invalid, although both Congress and the Executive were acutely aware of the impending expiration of the EPAA. If the statute had expired as scheduled, the decontrol order necessarily would have expired as well. But since the statute in fact was extended, the decontrol order, along with all other regulations of unspecified duration, would have continued in effect as a matter of course.[30]

In sum, even if the legislative veto provisions were severable and even if price control regulations actively shaped by the use of the veto power were otherwise enforceable, this Court should reverse the court below so as to effectuate the 30-month presidential decontrol order. To fail to do so would be to uphold the actual exercise of an unconstitutional legislative veto provision.

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[29] Even if the court was correct in ruling that the decontrol order had to be limited to 90 days, it should not have invalidated the order entirely, but merely limited the order's effectiveness to the 90-day period authorized by the statute. *See Rowell v. Andrus*, 631 F.2d 699, 704 (10th Cir. 1980).

[30] Reenactment of a statute leaves "the jurisdiction of [an] agency" undisturbed "as to those provisions which [are] continued under the new statute." *Pentheny, Ltd. v. Government of the Virgin Islands*, 360 F.2d 786, 790 (3d Cir. 1966).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2, 1984

Other counsel for petitioners are listed on the inside front cover.

APPENDIX A

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-103

EXXON CORPORATION, MOBIL OIL CORPORATION, and MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF ENERGY and DONALD P. HODEL, Secretary of Energy,
Defendants.

No. (N.D. Tex.) CA-3-75-0836-W

On Certification From the United States District Court for the Northern District of Texas

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No. 10-51

IN RE: THE DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION, M.D.L. 378

On Certification from the United States District Court for the District of Kansas

(Argued: May 10, 1984 Decided: July 6, 1984)

KEITH A. JONES, Fulbright & Jaworski, Washington, D.C., with whom M. W. Parse, Jr., Jerry E. Smith and A. Frank Koury of the same firm, Edward de la Garza, Exxon Corporation, Houston, Texas, R. Bruce McLean, Daniel Joseph and David A. Holzworth, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., and William C. Streets, Mark J. Forsch and Gail F. Schultz, Mobil Oil Corporation, Fairfax, Virginia, were on brief for plaintiffs in No. 5-103.

WARREN CHRISTOPHER, O'Melveny & Myers, Washington, D.C., with whom Carl R. Schenker, Jr., Aaron S. Bayer and Jacob M. Lewis of the same firm, and Joseph W.

Kennedy, Morris, Laing, Evans, Brock & Kennedy, Wichita, Kansas, were on brief for plaintiffs in No. 10-51.

LARRY P. ELLSWORTH, Assistant General Counsel, Thomas C. Newkirk, Don W. Crockett, David A. Engels, Marcia Sowles and John L. Gurney, Department of Energy, Washington, D.C., and Richard K. Willard, Acting Assistant Attorney General, with whom Anthony J. Steinmeyer and Douglas Letter, Department of Justice, Washington, D.C., were on brief for defendants in Nos. 5-103 and 10-51.

ANDREW P. MILLER, Dickstein, Shapiro & Morin, Washington, D.C., with whom Stephen G. Wielgoz of the same firm, James F. Flug and Paula Dinerstein, Lobel, Novins & Lamont, Washington, D.C., Bernard Nash and Edward G. Modell, Blum & Nash, Washington, D.C., David Frohnmayer, Attorney General of Oregon, Salem, Oregon, Irving I. Kimmelman, Attorney General of New Jersey, Trenton, New Jersey, Francis X. Bellotti, Attorney General of Massachusetts, Boston, Massachusetts, and Travis Medlock, Attorney General of South Carolina, Columbia, South Carolina, were on brief for intervenors States in No. 10-51.

KATHLEEN O. ARGIROPOULOS, Air Transport Association of America, Washington, D.C., with whom Richard T. Williams, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, California, were on brief for intervenor Air Transport Association of America.

HAROLD E. KOHN, Kohn, Savett, Marion & Graf, Philadelphia, Pennsylvania, with whom Joseph C. Kohn of the same firm, Alexander B. Mitchell, Sargent, Klenda, Haag & Mitchell, Wichita, Kansas, Philip P. Kalodner, Philadelphia, Pennsylvania, and Lee Ann Glanton, Philadelphia, Pennsylvania, were on brief for intervenors Geraldine H. Sweeney, RJG Cab, Inc., National Freight, Inc. and Philadelphia Electric Company in No. 10-51.

Before CHRISTENSEN, BECKER, and BROWN, Judges

BECKER, Judge

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT *

Nature of Actions and Original Jurisdiction

These are two consolidated actions, of which this Court has original jurisdiction under § 211(c) of the Economic Stabilization Act of 1970 found in 12 U.S.C. § 1904 Note, and incorporated in § 5(a)(1) of the Emergency Petroleum Allocation Act (EPAA), P.L. 93-159, 15 U.S.C. § 754(a)(1) as amended by the Energy Policy and Conservation Act (EPCA), P.L. 94-163, 15 U.S.C. § 754.

Original jurisdiction of each of these consolidated actions was acquired when the separate District Courts determined that, in an action pending therein, a substantial constitutional issue existed, and certified that issue to this Court. The separate issues so certified by

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* The following abbreviations and shortened titles are used herein: EPAA for Emergency Petroleum Allocation Act; EPCA for Energy Policy and Conservation Act; No. 5-103 for *Exxon Corporation, et al. v. United States Department of Energy, et al.*; No. 10-51 for *In Re: The Department of Energy Stripper Well Exemption Litigation*; Exxon for Exxon Corporation; Mobil for Mobil Oil Corporation, and Mobil Oil Exploration & Producing Southeast, Inc.; *Chadha* for *Immigration and Naturalization Service v. Chadha*; *Dyke* for *Gulf Oil Corporation v. Dyke, et al.*; DOE for United States Department of Energy; USCCAN for U.S. Code, Congressional and Administrative News; Bruff and Gellhorn for Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*; *Chevron* for *Chevron Oil Co. v. Huson*; *Northern Pipeline* for *Northern Pipeline Co. v. Marathon Pipe Line*; Breyer for Breyer, *The Legislative Veto After Chadha*; and *Annotation* for *Annotation: United States Supreme Court Views as to Retroactive Effect of Its Own Decisions Announcing New Rules.*

the separate District Courts are substantially the same. The certificates by the District Courts are set out hereinafter.

A. The Parties

Because this Court has original jurisdiction in these two consolidated actions, the parties in each action will be designated as plaintiffs and defendants, rather than appellants and appellees. The numbers, styles and parties in these two actions are as follows:

No. 5-103.

Exxon Corporation, et al.

v.

United States Department of Energy, et al.

On Certification from the
Northern District of Texas

No. (N.D. Tex.) CA-3-75-0836-W.

Plaintiffs.

The remaining plaintiffs in this original action (consolidated) are the following parties:

Exxon Corporation

Mobil Oil Corporation

Mobil Oil Exploration &
Producing Southeast, Inc.

Dorchester Gas Producing Company and Dorchester Gas Processing Company, originally plaintiffs in the District Court, have settled their controversy with the Department of Energy and are not parties to this proceeding.

Defendants.

The defendants in this original action are as follows:

United States
Department of Energy

Donald P. Hodel,
Secretary of Energy.

No. 10-51.

In Re: The Department of Energy
Stripper Well Exemption Litigation,
M.D.L. No. 378.

On Certification from the
District of Kansas.

This multidistrict civil litigation in which the parties are listed as follows:

Plaintiffs.

Energy Reserves Group, Inc.
Suburban Propane Gas Corporation
Marathon Oil Company
Sklar & Phillips Oil Company
Sierra Petroleum Co., Inc.
Braden-Zenith, Inc.
Mobil Oil Corporation
Mobil Producing Texas & New Mexico, Inc.
Willie Ansley Bryson
Stelbar Oil Corporation, Inc.
The Standard Oil Company, an Ohio Corporation
Theo M. Glenn, Jr.
Eleanor E. Glenn
Robert Dale Brandenburg
Texaco Inc., a Delaware Corporation
Aminoil USA, Inc.
Continental Oil Co., Inc. (Conoco)
Sun Exploration and Production Co.
Otis C. Peavey
Everal A. Peavey
Gladys G. Peavey
Ronald J. Peavey
Kenneth Wellbrock
Nora C. Binder
Fred J. Jorgensen
Arlene M. Wolfe
Dora J. Johnson

Robert F. Johnson
Marilyn J. Johnson
Howard Stout, Co-Trustee of the
Charles S. Page Trust
Lorena Houlton, Co-Trustee of the
Charles S. Page Trust
Mary E. Hall, Co-Trustee of the
Charles S. Page Trust
Gulf Oil Corporation
Robert E. Davis
Energy Consumers and Producers Association, Inc.
(formerly Oklahoma Association of Energy Consumers and Producers)
Ruthven, Inc.
Pioneer Operations Company, Inc.
George R. Jones
Rex Archer
T. B. Wilcox, III
Wico Oil Company
Jack Fena
James Tasheff
Robert G. Braden
National Cooperative Refinery Association
Estate of Martin Wunderlich
Estate of Charles F. Curry
Guy E. Stanley, Jr.
J. R. Dougherty
John B. Dougherty
Estate of Milton McGreevy
Herndon Drilling Company
Rhude & Fryberger, Inc.
Petroleum Management, Inc.
Atlantic Richfield Company
W. R. Murfin d/b/a Murfin Drilling Company
Champlin Petroleum Company
Exxon Corporation
Hunt Oil Company
Crystal Oil Company
Ira Thomas May
Muskegon Development Company
Paul B. Fletcher, Sr.

Anadarko Production Company
IU International Oil & Gas, Inc.
Wood Oil Co.
Dan Wallace d/b/a Columbus Oil Co.
Will I. Lewis Enterprises, Inc.
Jimmie Austin d/b/a Austin Drilling Company
Santa Fe Energy Company
George G. Anderman
Donald R. Kirby
Patricia Anne Leonard
Mary Kay Harrington
A. F. McMillan
Zula McMillan
Farmers Crude Production Co. (formerly Farmers Petroleum Cooperative, Inc.)
William C. Kirkwood d/b/a Kirkwood Oil and Gas Company
Petroleum Corporation of Texas

Defendants.

United States Department of Energy
Secretary of the United States Department of Energy

Intervenors.

Total Petroleum, Inc.
Tenneco Oil Company
Pennzoil Company
Tosco Corporation
Ashland Oil, Inc.
Texas City Refining, Inc.
American Independent Refiners Association (formerly American Petroleum Refiners Association)
Chevron U.S.A., Inc.
Farmland Industries, Inc.
Shell Oil Company
The State of Michigan
The State of Alabama
The State of California
The State of Arkansas
The State of Kansas

The State of Delaware
The State of Iowa
The State of North Dakota
The State of Rhode Island
The State of Texas
The Commonwealth of Virginia
The State of West Virginia
The State of Mississippi
The State of Montana
The State of Minnesota
The State of Colorado
The Commonwealth of Pennsylvania
The State of Georgia
The State of South Carolina
The State of Vermont
The State of Nebraska
The State of North Carolina
The State of Illinois
The State of Ohio
The State of South Dakota
The State of Wisconsin
The State of Oregon
The State of Maryland
The State of New Jersey
The State of Tennessee
The State of Nevada
The State of Hawaii
The State of New Mexico
The Commonwealth of Puerto Rico
The Territory of Guam
The U.S. Virgin Islands
The District of Columbia
The State of New York
The Commonwealth of Massachusetts
The State of Connecticut
The State of New Hampshire
The State of Maine
The State of Louisiana
The State of Utah
The State of Idaho
The State of Indiana
The State of Wyoming

National Freight, Inc.
Philadelphia Electric Co.
Payne 22, Inc.
Anthony Monaco
Rex Shipley
Robert Sharo
George Theodore
Harvey Hatfield
Richard Vielhaber
Nicholas Peto
National Oil Jobbers Council
Geraldine H. Sweeney
RJG Cab, Inc.
Air Transport Association of America
Virginia Electric and Power Company
The Jobbers' Group

B. Certificates of the District Courts

The material parts of the determinations and certificates of the District Courts follow:

In No. 5-103 by United States District Court for the Northern District of Texas.

Pursuant to section 211(c) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, the court hereby certifies to the Temporary Emergency Court of Appeals the following substantial constitutional issue raised by plaintiff Exxon Corporation in its Supplemental Motion for Summary Judgment:

> Whether the Emergency Petroleum Allocation Act of 1973 and the Energy Policy and Conservation Act are unconstitutional under *Immigration & Naturalization Service v. Chadha*, 103 S.Ct. 2764 (1983), in that they contain unconstitutional one-house legislative veto provisions that are not severable from the remainder of those statutes, thereby rendering void the regulations promulgated pursuant thereto.

(Style, title, words, date and signature omitted.)

In No. 10-51 by United States District Court for the District of Kansas.

On November 14, 1983, the plaintiffs moved to certify three constitutional issues to TECA, to vacate the referral of factfinding to the OHA, and to release the escrowed funds. The three constitutional issues are stated by the plaintiffs as follows:

> 1) Whether the Emergency Petroleum Allocation Act, as amended, must be declared unconstitutional, *ab initio*, because it contains an invalid and inseverable one-house legislative veto provision that was twice utilized to the detriment of plaintiffs.
>
> 2) Whether the Oil Pricing Policy added as section 8 to the Emergency Petroleum Allocation Act by section 401 of the Energy Policy and Conservation Act must be declared unconstitutional, *ab initio*, because it contains three invalid and inseverable one-house legislative veto provisions and imposed price controls to the detriment of plaintiffs.
>
> 3) Whether MDL No. 378 must be dismissed for lack of subject matter jurisdiction in view of the constitutional invalidity of the Emergency Petroleum Allocation Act, as amended, and section 401 of the Energy Policy and Conservation Act.

* * * *

IT IS THEREFORE ORDERED that the three constitutional issues raised by the plaintiffs and set out verbatim in this Memorandum and Order, *supra* p. 4 (quoted above), be certified to the Temporary Emergency Court of Appeals.

IT IS FURTHER ORDERED that the plaintiffs' motions to vacate the referral of factfinding to the OHA and to release the escrowed funds be held in abeyance pending TECA's resolution of the constitutional issues.

IT IS FURTHER ORDERED that OHA continue uninterrupted with its factfinding mission.

IT IS FURTHER ORDERED that this Court retain jurisdiction over this case and over the escrowed frund [sic] to the maximum extent consistent with the certification of constitutional issues to TECA. (Words in parentheses added. Style, title, words, date and signature omitted.)

C. Contentions of Parties

Plaintiffs' Contentions in No. 5-103.

In No. 5-103 the contentions of Plaintiffs Exxon Corporation (Exxon), Mobil Oil Corporation, and Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) in their joint brief and joint reply brief are as follows:

a. Exxon and Mobil have standing to challenge the EPAA and the EPCA.

b. The Constitutional principle announced in *Immigration and Naturalization Service v. Chadha* (*Chadha*), 462 U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), is not limited to legislative veto provisions enacted after the date of decision.

c. The EPAA, both as originally enacted and as amended by Title IV of the EPCA, is unconstitutional in its entirety because of the inclusion of inseverable legislative veto provisions.

1. Congress would not have conferred decontrol authority on the President without retaining a legislative veto because:

(a) Congress' central purpose in enacting the EPAA was to deprive President Nixon of his unchecked discretion over whether to impose allocation controls, and

(b) Congress' central purpose in enacting the EPCA was to prevent President Ford

from carrying out his announced intention of lifting allocation and price controls.

2. The inseverability of the legislative veto provisions requires invalidation of the entire EPAA both as originally enacted and as amended by Title IV of the EPCA.

(a) Decontrol authority was inseverable from the remainder of the EPAA and Title IV of the EPCA because decontrol authority was a functionally integral part of the overall statutory scheme and because decontrol authority was a necessary ingredient of the political compromise leading to enactment.

(b) Preservation of the regulatory program after *Chadha* cannot be rationalized on other grounds.

d. The defendants' threshold contentions regarding standing and retroactivity are insubstantial.

1. Exxon and Mobil have standing.

2. The rule announced in *Chadha* is retroactive.

e. The legislative veto provisions in the EPAA and the EPCA are not severable from the statutory program of mandatory price controls.

1. This Court's decision in *Gulf Oil Corporation v. Dyke, et al.* (*Dyke*), —— F.2d ——, (TECA Nos. 9-80, 9-81, April 17, 1984), does not dispose of this case.

2. The defendants rely upon an incorrect test of severability.

3. The EPAA contained no implicit severability clause.

4. The decision-making structure of the EPAA and the EPCA was Constitutionally tainted by the presence of a mechanism for legislative veto.

Plaintiffs' Contentions in No. 10-51.

Plaintiffs in No. 10-51 (listed elsewhere) filed a joint brief and a joint reply brief. In those briefs their contentions are as follows:

a. The EPAA and the EPCA are unconstitutional *in toto* because the legislative veto provisions are inseverable, and DOE's price control regulations therefore are void.

   1. Severance is impermissible as to functionally integral provisions of compromise legislation which were necessary to procure passage by Congress or signature by the President.

   2. The EPAA would not have been enacted in the same form without its invalid provisions.

   3. The EPCA would not have been enacted in the same form without its invalid provisions.

b. Even assuming that the legislative veto provisions of the EPAA and the EPCA are severable, DOE's price control regulations cannot Constitutionally be enforced.

   1. If DOE's regulations are to be enforced at all, effect must be given to unconstitutionally vetoed decontrol amendments.

   2. DOE's price control regulations are unconstitutional because they were pervasively tainted by the veto power reserved to, and used by, Congress.

c. There are no procedural bars to relief.

Intervenors' Contentions in No. 10-51.

In No. 10-51 the intervenors States filed a joint brief. In this brief their contentions were as follows:

a. This Court's decision in *Dyke, supra,* holding the legislative veto to be severable from the remainder of the EPAA and EPCA, is dispositive of this case.

b. Because the President's decontrol proposals were without effect, plaintiffs have not suffered any injury.

   1. Even in the absence of the Congressional vetoes, the decontrol plans were not capable of taking effect without further legislation.

   2. Congressional enactments subsequent to the last exercise of a legislative veto retroactively and validly rejected the decontrol proposals in issue.

c. The existence of the legislative veto provisions did not "taint" the regulations.

d. Even if, *arguendo*, *Chadha* mandated a halt to price control enforcement, that decision should not be retroactively applied.

In No. 10-51 the intervenor Air Transport Association of America filed a brief. In this brief its contentions were as follows:

a. Plaintiffs are foreclosed by F.R.Civ.P. 60(b) and by waiver from pursuit of this appeal.

b. Plaintiffs lack standing to challenge the legislative veto provisions of the EPAA and EPCA.

c. The substantive provisions of the EPAA and the EPCA can and should be severed from the provisions for a one-House legislative veto.

d. Plaintiffs seek an improper and unduly broad remedy.

In No. 10-51 the intervenors Geraldine H. Sweeney, RJG Cab, Inc., National Freight, Inc. and Philadelphia Electric Company filed a joint brief. In this brief their contentions were as follows:

a. Consistent with the intent of Congress both the Presidential decontrol authority and the legislative veto should be severed from the statutes.

b. Plaintiffs' argument that the critical test is not the Congressional intent but whether Congress could have passed the EPAA and EPCA over the President's opposition is without merit.

   1. There is no real evidence either that the President would have vetoed the EPAA and EPCA without presidential decontrol (subject to legislative veto) provisions, or, that had he done so, Congress would have been unable to override his veto.

   2. There is no legal authority for plaintiffs' position that a determination of severance be based on speculation as to what Congress could have done in the face of presidential veto.

c. Even if the legislative vetoes alone were severed from the statutes, plaintiffs could not benefit from the two crude oil phase-out amendments actually proposed nor from those which might have been proposed.

   1. The two phase-out crude oil amendments were null and void *ab initio* since they were not within the President's statutory authority and the President agreed retroactively to the elimination of the "amendments" from the regulatory scheme, therefore plaintiffs were not injured by either of the legislative vetoes.

   2. Even if the 30-month decontrol provision were to be given effect, it would be only for the period from July 25 to September 1, 1975.

   3. No effect can be given to phase-out amendments which were never proposed to the Congress.

   4. Plaintiffs are barred by laches from seeking now to implement decontrol measures vetoed in July, 1975.

d. The challenge to the legislative veto provides plaintiffs no standing to challenge the mandatory price regulations since they were not subject to the legislative veto.

Defendants' Contentions
In Nos. 5-103 and 10-51.

In consolidated actions Nos. 5-103 and 10-51 defendants United States Department of Energy and Donald P. Hodel, Secretary of Energy, filed a single joint brief and a single reply brief. In those briefs their contentions are as follows:

a. The legislative veto provisions are severable from the EPAA and EPCA.

b. Neither the EPAA and EPCA nor the underlying price control regulations should be retroactively invalidated.

1. There is no justification for declaring the EPAA and EPCA void *ab initio.*

(a) The *Chadha* ruling is one of first impression.

(b) Retroactive invalidation of the EPAA and the mandatory pricing regulations would not further the purpose of the Supreme Court's holding in *Chadha.*

(c) Retroactive invalidation of the EPAA would be inequitable.

2. The mandatory petroleum pricing regulations are not unconstitutionally "tainted" and should not be retroactively modified by this Court.

(a) Plaintiffs lack standing to raise their speculative argument.

(b) Plaintiffs' argument that the mere existence of the legislative veto "chilled" the President's actions is rank speculation unsupported by the record.

(c) This Court should not retroactively modify the price control regulations.

D. *Legislative History and Statutory Provisions of the "Emergency Petroleum Allocation Act of 1973," Including the One-House Veto of § 4(g)(2)*

In 1973, the 93rd Congress, First Session, found that there was a National shortage of crude oil and actual or imminent shortages of refined petroleum products. Early in 1973 that Congress, by the "Economic Stabilization Act Amendments of 1973" had authorized, but did not require, the President to order mandatory allocations of gasoline and other petroleum products for purposes including the assurance of distribution thereof to meet the essential needs of various sections of the Nation. Instead of imposing a program of mandatory allocation of those products, the President decided to rely on a voluntary program, announced May 10, 1973. This voluntary program encouraged the major companies to share their supplies of those products with their competitors. Later in 1973 the 93rd Congress, First Session, found that the voluntary program had failed and was "doomed to even greater failures." These findings were recorded in House Report No. 93-531, adopted in the Report No. 93-628 of the Committee of Conference of the House and the Senate. 2 U.S. Code, Congressional and Administrative News (USCCAN), 93rd Congress, First Session, (House Report No. 93-531) 2582 at pages 2583, 2588, (Conference Report No. 93-628) 2688.

In November 1973, because of the existing emergency, growing in intensity, that Congress with the approval of the President enacted into law the mandatory Emergency Petroleum Allocation Act of 1973, authorizing and directing the President to adopt within 10 days, and to implement within 15 days thereafter a program for the mandatory allocation (and pricing) of crude oil, residual

and refined petroleum products in the manner, and for the purposes, defined in the EPAA, which became effective November 27, 1973. P.L. 93-159, 87 Stat. 627, 15 U.S.C. 751, *et seq.*

The One-House Veto.

The EPAA contained in § 4(g)(2) authority for Presidential proposals of exemptions of crude oil and petroleum products and for a "one-House" veto thereof in the following provision:

> (2) If at any time after the date of enactment of this Act the President finds that application of the regulation under subsection (a) to crude oil, residual fuel oil, or a refined petroleum product is not necessary to carry out this Act, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this Act, he may prescribe an amendment to the regulation under subsection (a) *exempting such oil or product from such regulation for a period of not more than ninety days.* The President shall submit any such amendment and any such findings to the Congress. An amendment under this paragraph may not exempt more than one oil or one product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment. (Emphasis added.)

E. *Legislative History and Statutory Provisions of the Energy Policy and Conservation Act, Including the One-House Veto of §§ 551 and 552*

In December 1975, because of the expiration of the mandatory program of the EPAA, growing shortages of crude oil and refined petroleum products, interruption of imported crude oil and petroleum products by the Arab embargo, the excess of National natural gas consumption over discoveries beginning in 1968, and experience under the mandatory program of the EPAA, the 94th Congress, First Session, after temporary extension of the EPAA, enacted and the President approved the Energy Policy and Conservation Act, which became effective December 23, 1975. P.L. 94-163, 89 Stat. 871, 42 U.S.C. 6201, Note.

The relevant legislative history of the EPCA is recorded in House Report 94-340, Senate Conference Report No. 94-516, including the Joint Explanatory Statement of the Committee of Conference. 2 USCCAN, 94th Congress, First Session, (House Report) 1762, (Portion of Senate Conference Report No. 94-516, containing Joint Explanatory Statement of the Committee of Conference) 1956.

Among other things, the EPCA in Title IV amended and extended the program of the EPAA and converted the EPAA from a mandatory authority to a standby authority to permit the President to exempt an oil or product from regulation, or to gradually and selectively exempt an oil or a product from all or some control by allocation or price. To accomplish these purposes the EPAA was transformed from a temporary to a permanent law in conjunction with the conversion to a standby authority, with power in the President to reimpose controls on an exempted oil or product. The "one-House" veto, § 4(g)(2) of the EPAA was amended and expanded by the EPCA.

The portions of the EPAA and EPCA under critical review in these actions are the provisions providing for Congressional review, authorizing the "one-House" veto of the proposals of the President to exercise his authority to exempt for a limited time, an oil or product from regulation wholly, selectively, or in a phased manner. An exercise of this authority by an "energy action" of the President amending the mandatory regulations was provided. 2 USCCAN, 94th Congress, First Session, *supra*, at pages 1818, 2058.

The Congressional review provisions of the EPCA were those contained in the House Bill adopted by the Committee of Conference. In § 401 of the EPCA the President was authorized to report to Congress on February 15, 1977, and at other times, and could submit an "energy action" subject to § 551 of the EPCA. Section 551 (and associated § 552) provided for the Congressional review by a "one-House" veto now found to be unconstitutional in the *Chadha* case, *supra*.

The critical provisions, § 551 and § 552 of the EPCA, are as follows:

> Sec. 551.(a) For purposes of this section, the term "energy action" means any matter required to be transmitted, or submitted to the Congress in accordance with the procedures of this section.
>
> (b) The President shall transmit any energy action (bearing an identification number) to both Houses of Congress on the same day. If both Houses are not in session on the day any energy action is received by the appropriate officers of each House, for purposes of this section such energy action shall be deemed to have been transmitted on the first succeeding day on which both Houses are in session.
>
> (c)(1) Except as provided in paragraph (2) of this subsection, if energy action is transmitted to the Houses of Congress, such action shall take effect at the end of the first period of 15 calendar days of

continuous session of Congress after the date on which such action is transmitted to such Houses, unless between the date of transmittal and the end of such 15-day period, either House passes a resolution stating in substance that such House does not favor such action.

(2) An energy action described in paragraph (1) may take effect prior to the expiration of the 15-calendar-day period after the date on which such action is transmitted, if each House of Congress approves a resolution affirmatively stating in substance that such House does not object to such action.

(d) For the purpose of subsection (c) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 15-calendar-day period.

(e) Under provisions contained in an energy action, a provision of such an action may take effect on a date later than the date on which such action otherwise takes effect pursuant to the provisions of this section.

(f) (1) This subsection is enacted by Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (2) of this subsection; and it supersedes other rules only to the extent that it is inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in

the same manner and to the same extent as in the case of any other rule of the House.

(2) For purposes of this subsection, the term "resolution" means only a resolution of either House of Congress described in subparagraph (A) or (B) of this paragraph.

(A) A resolution the matter after the resolving clause of which is as follows: "That the ———— does not object to the energy action numbered ———— submitted to the Congress on ————, 19—.", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one energy action.

(B) A resolution the matter after the resolving clause of which is as follows: "That the ———— does not favor the energy action numbered ———— transmitted to Congress on ————, 19—.", the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one energy action.

(3) A resolution once introduced with respect to an energy action shall immediately be referred to a committee (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(4) (A) If the committee to which a resolution with respect to an energy action has been referred has not reported it at the end of 5 calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of any other resolution with respect to such energy action which has been referred to the committee.

(B) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same energy action), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same energy action.

(5) (A) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(B) Debate on the resolution referred to in subparagraph (A) of this paragraph shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable.

An amendment to, or a motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to; except that it shall be in order—

(i) to offer an amendment in the nature of a substitute, consisting of the text of a resolution described in paragraph (2)(A) of this subsection with respect to an energy action, for a resolution described in paragraph (2)(B) of this subsection with respect to the same such action, or

(ii) to offer an amendment in the nature of a substitute, consisting of the text of a resolution described in paragraph (2)(B) of this subsection with respect to an energy action, for a resolution described in paragraph (2)(A) of this subsection with respect to the same such action.

The amendments described in clauses (i) and (ii) of this subparagraph shall not be amendable.

(6)(A) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution shall be decided without debate.

(7) Notwithstanding any of the provisions of this subsection, if a House has approved a resolution with respect to an energy action, then it shall not be in order to consider in that House any other resolution with respect to the same such action.

Sec. 552. (a) Any contingency plan transmitted to the Congress pursuant to section 201(a)(1) shall bear an identification number and shall be transmitted to both Houses of Congress on the same day and to each House while it is in session.

(b) No such contingency plan may be considered approved for purposes of section 201(a)(2) of this Act unless between the date of transmittal and the

end of the first period of 60 calendar days of continuous session of Congress after the date on which such action is transmitted to such House, each House of Congress passes a resolution described in subsection (d) (2).

(c) For the purpose of subsection (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-calendar-day period.

(d) (1) This subsection is enacted by Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (2) of this subsection; and it supersedes other rules only to the extent that it is inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(2) For purposes of this subsection, the term "resolution" means only a resolution of either House of Congress the matter after the resolving clauses of which is as follows: "That the ———— approves the contingency plan numbered ———— submitted to the Congress on ————, 19—.", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a reso-

lution which specifies more than one contingency plan.

(3) A resolution once introduced with respect to a contingency plan shall immediately be referred to a committee (and all resolutions with respect to the same contingency plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(4) (A) If the committee to which a resolution with respect to a contingency plan has been referred has not reported it at the end of 20 calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration of any other resolution with respect to such contingency plan which has been referred to the committee.

(B) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same contingency plan), and debate thereon shall be limited to not more than 1 hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same contingency plan.

(5) (A) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed

to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the notion [sic] shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(B) Debate on the resolution referred to in subparagraph (A) of this paragraph shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

(6) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedures relating to a resolution shall be decided without debate.

89 Stat. 965-969, 42 U.S.C. 6421, 6422.

The EPCA in Title IV, Part A amended the EPAA to provide authority and mandatory early adoption by the President of described amendments to the existing regulations on pricing policies adopted pursuant to § 4(a) of the EPAA, and for needed amendments of the regulations under EPAA, at six months intervals. The amendments to the EPAA in Title IV, Part A of the EPCA also required and authorized the President to submit to Congress on February 15, 1977 a report containing an analysis of the impact of any such amendments to regu-

lations on the National economy and on supplies of crude oil, residual fuel oil and refined petroleum products; and authorized the President to submit any amended regulations that provided for continuation, modification of certain adjustments in the mandatory regulations authorized by § 4(a) of the EPAA as amended. Each of the mandatory and permissive amended regulations proposed by the President was expressly made subject to the "one-House" veto provisions of § 551 of the EPCA.

Provision was made for the expiration of all authorities, including standby authorities, regulations and orders granted by the EPCA or EPAA at midnight, June 30, 1985, with a minor savings clause for undetermined specified pending matters.

F. *The Two Exercises of the One-House Veto in July 1975*

On July 22, 1975 and on July 30, 1975 the House of Representatives, purporting to act under the "one-House" veto provision of § 4(g)(2) of the EPAA, adopted resolutions of disapproval of the plans of the President to exempt crude oil from mandatory control and pricing regulations. The first proposal of the President to be disapproved was for phased decontrol of crude oil over a time span of 30 months. This proposal of the President was disapproved by House Resolution No. 605 adopted July 22, 1975. 121 Cong. Rec. 23960-23984 (July 22, 1975). The veto is described in 40 Fed. Reg. 31741 (1975).

The second plan of the President was for phased decontrol of crude oil over a period of 39 months, with phased small price increases before the 1976 elections, and larger increases thereafter. This plan was disapproved by the House Resolution No. 641 adopted July 30, 1975. 121 Cong. Rec. 25870-25882 (July 30, 1975). The veto is described in 40 Fed. Reg. 34161 (1975). The facts concerning these actions of the House and the

President are briefly and accurately summarized from official records in Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes* (Bruff and Gellhorn), 90 *Harvard Law Review* 1369 at pages 1390-1393 (1977).

The parties disagree whether the two plans proposed by the President were in substance authorized by the EPAA because the time spans of phased decontrol in each exceeded 90 days.

In 1975 the controversy between the President and Congress over decontrol of crude oil and other petroleum products was settled by passage of the EPCA by the Congress and approval thereof by the President, effective December 22, 1975.

I

Standing

In the unique circumstances of these cases, in which plaintiffs (and some intervenors) challenge the Constitutionality of the EPAA, the EPCA, all or some of the mandatory regulations authorized thereby, and, impliedly, the limited jurisdiction of this Temporary Emergency Court of Appeals of the United States, we conclude that the standing requirement is met. *Chadha* case, *supra*, 462 U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d at pages 334, 335 (1983); *Dyke* case, *supra*, —— F.2d —— (TECA 1984).

The natures of the crude oil, natural gas liquids and other petroleum products of plaintiffs, subject to the challenged statutes and regulations under review do not limit the conclusions of law herein, which extend to all provisions of the EPAA, the EPCA and regulations authorized thereby.

Because of the unique circumstances, and the limited issues in these cases, the conclusions of law hereof are intended to apply only to the issues arising in these

actions under the EPAA, the EPCA and regulations authorized thereby.

In the *Dyke* case, *supra*, this Court held that the appellant and cross-appellee Gulf Oil Corporation had standing to challenge the subject matter jurisdiction of this Court on the contention that "[t]he applicable statutes granting jurisdiction to this Court contain inseverable and unconstitutional legislative veto provisions, the legislation is void and this Court has no jurisdiction over the cross-appeal" of the *Dyke* case, *supra*. We approve the holding of the *Dyke* case, *supra*, on this issue of standing, and conclude further that plaintiffs in these cases have standing to challenge the Constitutionality of the asserted exercises of the "one-House" veto and the authorizations therefor, under the EPAA, the EPCA and the validity of the regulations authorized thereby.

II

The Ruling of the Chadha Case Should Not Be Applied Retroactively To Invalidate All or Any Part or Parts of the EPAA, the EPCA, or the Regulations Authorized Thereby

The primary issue to be decided in these actions is whether the recent ruling of the Supreme Court of the United States in *Immigration and Naturalization Service v. Chadha*, *supra*, 462 U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), should be applied retroactively to invalidate all or any part or parts of the EPAA, the EPCA or regulations authorized thereby. If this issue is decided against retroactive application of the ruling in the *Chadha* case, all other secondary contentions of the parties based on the ruling of the *Chadha* case are foreclosed. We conclude that, under controlling decisions of the United States Supreme Court, the ruling of the *Chadha* case should not be applied retroactively to all

or any part or parts of the EPAA, the EPCA (including the "one-House" veto provisions thereof), and the regulations authorized thereby. The reasons for this conclusion follow.

The controlling recent decisions of the Supreme Court on the issue of retroactivity in these cases are *Chevron Oil Co. v. Huson* (*Chevron*), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), and *Northern Pipeline Co. v. Marathon Pipe Line* (*Northern Pipeline*), 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). A summary of the considerations properly bearing on the issue of retroactivity enunciated in the *Chevron* case, *supra*, and in the ruling against retroactivity in the *Northern Pipeline* case, *supra*, are contained in the following quotation from the *Northern Pipeline* case, *supra*:

> Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in 28 U.S.C. § 1471 (1976 ed., Supp. IV) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the Act. Our decision in Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, id., at 106, 30 L.Ed.2d 296, 92 S.Ct. 349; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, id., at 107, 30 L.Ed.2d 296, 92 S.Ct. 349; and third, whether retroactive application "could produce substantial inequitable results" in individual cases, ibid. In the present case, all of these considerations militate against the retroactive application of our holding today. It is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III. It is equally plain that retroactive ap-

plication would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively. (Footnotes omitted. 458 U.S. at pages 87, 88, 102 S.Ct. at page 2880, 73 L.Ed.2d at pages 625, 626.)

Applying the three considerations summarized and applied in the *Northern Pipeline* case, *supra*, we find from the legislative history, the statutory provisions of the EPAA and EPCA, the regulations, and the judicially noticed administrative history and judicial decisions of this Court that:

1. The holding of the *Chadha* case, *supra*, decided an issue of first impression whose resolution was not clearly foreshadowed by earlier cases. This finding is supported by the unchallenged findings of the majority and concurring opinions in the *Chadha* case, *supra*, and the findings of many reliable scholarly articles on legal history of which these are examples: Breyer, *The Legislative Veto After Chadha* (Breyer), 72 *Georgetown Law Journal* 785 (1984); and Bruff and Gellhorn, *supra*, 90 *Harvard Law Review* 1369 (1977), noting the Constitutional questions concerning the "one-House" veto based on the separation of powers and bicameralism, and concluding, "whether the legislative veto will founder upon these constitutional objections is unclear." Bruff and Gellhorn, *supra*, 90 *Harvard Law Review* at page 1374.

2. Retrospective operation in these cases of the holding of the *Chadha* case, *supra*, will retard the operation of that holding as surely as retroactive operation of the *Northern Pipeline* holding to the bankruptcy system would have retarded operation of that holding.

3. Retroactive application in these cases of the holding of the *Chadha* case, *supra*, not only could, but

> would produce substantial inequitable results in these and other cases, because of the pervasive, massive statutory and regulatory applications to the National energy industry since 1973 in closed proceedings that might be reopened and in open pending proceedings and uncompleted transactions, that might be questioned and relitigated under a retroactive application. It is no answer to the inequitable results, that could and would result, to support a limited retroactivity that would not apply to closed proceedings and transactions only.

Further, in determining whether in particular circumstances to order retroactive application of a Constitutional rule of law, recently announced by the judiciary, a foremost criterion is the purpose of the newly announced rule, and whether retroactive application will further or retard its operation. The purpose of the new rule in the *Chadha* case, *supra*, holding a "one-House" veto unconstitutional was stated in the words of the Supreme Court, as follows:

> Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I. The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and present-

ment to the President. (Footnotes omitted. 462 U.S. at page —, 103 S.Ct. at page 2787, 77 L.Ed.2d at pages 348, 349.)

The "one-House" veto was an unconstitutional legislative device that first appeared in federal legislation in 1932 and proliferated in numbers through 1982. The purpose of the *Chadha* case was to prevent the continued use of that legislative veto device. Breyer, *supra*, 72 *Georgetown Law Journal* 785; *Severability of Legislative Veto Provisions: A Policy Analysis* (Note), 97 *Harvard Law Review* 1182 (1984). No retroactive application of the rule of the *Chadha* case to the EPAA, the EPCA or regulations authorized thereby is necessary or desirable to further that purpose. That purpose can be fully achieved without retroactive application of the rule of the *Chadha* case to the EPAA or EPCA or the regulations authorized thereby. *Annotation: United States Supreme Court's Views as to Retroactive Effect of Its Own Decisions Announcing New Rules (Annotation)*, 65 L.Ed.2d 1219 at pages 1233, 1235-1237 (1981), and cases cited therein.

From the legislative history of the EPAA and the EPCA we take convincing judicial notice that, prior to the expiration of the mandatory regulations adopted, administered and enforced pursuant to the authority of the EPAA and the EPCA, the reliance placed thereon for ten years before the *Chadha* case extended to every part of the huge essential National and international energy industry, from producers, financiers, refiners, processors, distributors, to direct and indirect purchasers of energy, and the products thereof, including consumers, and extended to nearly every part of the National economy. The resulting effects of the open, as well as closed, large, average and small proceedings and transactions are so numerous that they are uncountable, nearly infinite, immeasurable and irreversible in economic effects and legal rights. The huge numbers of these uncountable

transactions include a nearly infinite number of large, average and small transactions in closed proceedings, and a myriad of irreversible uncompleted transactions and pending proceedings, in which uncountable numbers of parties justifiably obeyed the EPAA, the EPCA and regulations authorized thereby in good faith and without questions. To attempt to apply the rule of the *Chadha* case to the nearly infinite number of closed, or to the huge number of uncompleted transactions and pending proceedings, and effects thereof, would defeat good faith reliance on National laws in these and in future circumstances. See *Annotation*, *supra*, 65 L.Ed.2d 1219 at pages 1237-1239, and cases therein cited.

Retroactive application of the rule of the *Chadha* case, *supra*, would produce substantive inequitable results by affording an opportunity to litigate or repudiate a nearly infinite number of obligations incurred or performed in good faith, and enforced or enforceable in administrative and judicial proceedings under the authority of the EPAA and the EPCA, the effects of which have been transmitted for more than ten years throughout the National economy. Retroactive application of the rule would cause substantive inequitable results to uncountable parties, and would impose substantial and impossible burdens on the administration of justice, which would be confronted with a nearly uncountable and immeasurable number of claims of a myriad of parties. To reverse the previously declared obligations imposed by the terms of the EPAA, the EPCA and the pervasive mandatory regulations authorized thereby would be impossible. Even if the rule of the *Chadha* case were retroactive only to pending or open proceedings, tasks impossible to perform would be imposed on the administration of justice.

III

Alternate Conclusions of Law If the Rule of The Chadha Case Is Held To Be Retroactive

If the *Chadha* case, *supra*, is ultimately held to be retroactive in application to the EPAA and the EPCA, it will be necessary to determine whether the "one-House" veto provisions thereof are severable from the remainder of those Acts. So we make the following alternative conclusions on severability.

Severability of the One-House Veto Provisions of the EPAA and the EPCA.

Acting on a challenge to the subject matter jurisdiction of this Court, based on the contention that the ruling of the *Chadha* case, *supra*, invalidates the whole of the EPAA and the EPCA, this Court has held in a convincing scholarly and sound opinion by Judge Estes that the "one-House" veto provisions of those Acts are severable. *Gulf Oil Corporation v. Dyke, et al. (Dyke)*, *supra*, —— F.2d ——, (TECA Nos. 9-80, 9-81, April 17, 1984). We follow the ruling of the *Dyke* case and conclude that the "one-House" veto provisions of the EPAA and of the EPCA are severable.

Plaintiffs contend that the ruling of the *Dyke* case did not conclude the question of validity of the regulations authorized by the EPAA and the EPCA. We conclude that the ruling of severability of the *Dyke* case, *supra*, does apply to uphold the validity, on their face, of the regulations authorized by the EPAA and the EPCA. This leaves only the questions whether those regulations are invalid because of additional contentions that they are "tainted" by the "one-House" veto, or rendered invalid because of the two exercises in July 1975 of the "one-House" veto disapproving plans of the President for phased decontrol of crude oil.

We move to rulings on those additional questions.

The Regulations Authorized By the EPAA and the EPCA Are Not Invalid Because of "Taint" by the One-House Veto Provisions.

We conclude that the regulations authorized by the EPAA and the EPCA are not "tainted" because: (1) these regulations were confirmed and extended by the enactment of the EPCA by both Houses of Congress and approved by the President, thereby Constitutionally amending and extending the EPAA and the regulations authorized thereby; (2) the records and papers relied on to prove coercive "taint" arising from presence of the "one-House" veto provisions of the EPAA and the EPCA do not establish any illegal, fraudulent or coercive effect on the President; and (3) the plans of the President to decontrol crude oil, disapproved by the House in July 1975, were not plans or amendments to mandatory regulations authorized by the EPAA.

1. The regulations, about which plaintiffs complain, and the authority for their adoption were confirmed and extended in a Constitutional manner by passage of the EPCA by both Houses of Congress and approval thereof by the President in 1975. This followed formal and informal debate, in and out of Congress, confrontation between the President and Congress, repeated and changing analyses of the relevant experience, and enactment of a new impartial law in a manner expected from the separation of powers of the Legislative and Executive Departments by our Constitution. Compare *Clark v. Valeo*, 559 F.2d 642 (C.A.D.C.), *affirmed*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977). See *Mapco v. Carter*, 573 F.2d 1268 at page 1278 (TECA), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3090, 57 L.Ed.2d 1134 (1978), in which the following applies concerning the enactment of the EPAA and amendment by the EPCA under our Constitutional system:

> In our constitutional tripartite system of government, featuring checks and balances between

and within the three branches, it is rarely the case, if ever the case, that all branches of the government join in a unanimous, clear statement of policy or meaning of a law that all people unanimously understand and interpret exactly the same way. Frequently, the executive, legislative, and judicial branches disagree about laws and policies. One branch of government acting within its constitutional authority sometimes nullifies or restricts action of another branch.

Popular elections are regularly scheduled by the Constitution and laws of the nation and states as opportunities to change laws, policies, and the principal national officers of the legislative and executive branches of the federal government. If the legislative branch declares a clear policy and enacts a law to implement the policy, it may later change that law and policy if it acts within accepted constitutional limitations. The judicial branch may declare actions of the legislative and executive branches unconstitutional, or interpret such actions contrary to contentions of the officers of the executive or legislative branches.

The right claimed by plaintiffs is not consistent with these accepted constitutional principles. Even subjectively, the plaintiffs had no constitutional or other right to assume that the federal government or any branch thereof represented prior to December 1975, or made a policy that the permissible prices of "upper-tier" oil would never be changed or reduced. (Footnote omitted.)

The proper factual and legal conclusions concerning the controversy in 1975 between the President and Congress on decontrol of crude oil were expressed in Bruff and Gellhorn, *supra*, 90 *Harvard Law Review* at page 1392 as follows:

The agency would go no further; it made no more submissions prior to December 1975, when the enactment of the Energy Policy and Conservation Act of 1975 (EPCA) settled the issue by legislation.

2. The many records, articles and papers, including those of the President, prove no unconstitutional coercive "tainting" of the regulations under the EPAA and EPCA. In 1973, the "one-House" veto had existed for over forty years in various forms without producing a judicial finding of coercion beyond speculation. The President from 1973 to 1975 not only was not coerced, he composed and promulgated the challenged regulations through Executive Departments. He confirmed their need in the energy crisis, accepting the Congressional judgment by signing into law the EPAA and the EPCA. We do not believe that any of the cases cited by plaintiffs in support of their contentions are legally controlling, or factually in point on this contention.

3. The plans of the President to decontrol crude oil disapproved by the House in July 1975 were not authorized amendments of the regulations under the EPAA because they were each effective for over 90 days, and both proposed plans of the President extended beyond the original expiration date of the EPAA. As such they could not be made effective without further legislation enacted by both Houses of Congress and signed by the President or passed over his veto. See § 4(g)(2), quoted above, providing that proposals of the President to exempt oil or a product by amendment to a mandatory regulation shall be "for a period of not more than ninety days."

FINAL CONCLUSIONS OF LAW

We conclude that the ruling of the *Chadha* case, *supra*, that the "one-House" veto is unconstitutional should not be applied retroactively to the EPAA, the EPCA and to regulations authorized thereby.

In the alternative, we conclude that the "one-House" veto provisions of the EPAA and the EPCA are severable.

Further, in the alternative, we conclude that the regulations authorized by the EPAA and the EPCA are not tainted, coerced and rendered invalid by the "one-House" veto of the EPAA and the EPCA or of either of them.

Further, in the alternative, we conclude that the two proposed plans of the President in 1975 to decontrol crude oil, vetoed by the House of Representatives were not authorized by the EPAA and cannot be retroactively enforced.

Further, as a result of the foregoing conclusions we conclude that neither the above described action (consolidated) in the Northern District of Texas nor the above described actions in the District of Kansas should be dismissed for lack of subject matter jurisdiction because of the ruling in the *Chadha* case, *supra*, that the "one-House" vetoes in the EPAA and EPCA are unconstitutional. A judgment on a separate page is attached.

JUDGMENT

For the reasons stated in Findings of Fact and Conclusions of Law filed herewith, it is

ORDERED AND ADJUDGED that the Emergency Petroleum Allocation Act of 1973, the Energy Policy and Conservation Act of 1975, except possibly the "one-House" veto provisions thereof, and all regulations authorized and adopted thereunder, are not affected or rendered invalid in any respect by the ruling that a "one-House" veto is unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).